IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0501

STATE OF MONTANA,

Plaintiff and Appellee,

v.

KEVIN LEE CHRISTIANSEN,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Twelfth Judicial District Court, Hill County,
The Honorable John C. McKeon, Presiding

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STATEMENT OF THE ISSUES

1. Did the district court err by failing to give the same instruction regarding "actual physical control" that it gave in an earlier trial, which ended in a hung jury?

2. Did the district abuse its discretion when it instructed the jury on "actual physical control"?

STATEMENT OF THE CASE

A jury found the Defendant/Appellant, Kevin Lee Christiansen, guilty of felony driving under the influence of alcohol (DUI) in violation of Mont. Code Ann. § 61-8-401(1)(a). (Appellant's App. A at 1.) Christiansen was committed to the Department of Corrections (DOC) for 13 months for placement in an appropriate program, to be followed by a suspended DOC commitment for two years. (Appellant's App. A at 2.) He appeals his conviction. (D.C. Doc. 137.)

Prior to this conviction, Christiansen was tried for the same offense in a trial that ended in a hung jury and mistrial. (D.C. Doc. 78.)

STATEMENT OF FACTS

In general, the State does not contest Christiansen's Statement of Facts. (Appellant's Br. at 2-5.) At 3 a.m. on May 3, 2008, Christiansen was sitting

upright in the driver's seat of a vehicle, with the key in the ignition and the motor running, and the brake lights on. (6/4/09 Tr. at 160-62; 168.) His blood alcohol level was .26. (6/4/09 Tr. at 204.) The vehicle was parked in front of a bar. (6/4/09 Tr. at 160.) Christiansen was asleep when law enforcement arrived on the scene. (6/4/09 Tr. at 204.)

The following testimony was given on cross-examination of the investigating officer, Deputy Sheriff Geer:

> Q: (By [Defense Counsel]) And clearly there was no way that Kevin [Christiansen] could operate this vehicle, is that right?
>
> A: I can't say.
>
> Q: Okay. You felt he was sleeping. So do you feel while he was sleeping, he could operate that motor vehicle?
>
> A: When he's sleeping, no.
>
> Q: Okay. And that's the condition you found him in?
>
> A: Yes.

(6/4/09 Tr. at 192.)

STANDARD OF REVIEW

This Court uses an "abuse of discretion" standard of review for jury instructions. A district court has broad discretion when it instructs a jury. State v. Bieber, 2007 MT 262, ¶ 22, 339 Mont. 309, 170 P.3d 444. A district court abuses that discretion when it acts arbitrarily or exceeds the bounds of reason resulting in

substantial injustice. Id. The burden to demonstrate an abuse of discretion is on the party seeking reversal based on an unfavorable trial court ruling. State v. Sheehan, 2005 MT 305, ¶ 18, 329 Mont. 417, 124 P.3d 1119.

This Court reviews jury instructions as a whole to determine whether they fully and fairly instruct the jury on the law applicable to the case. Bieber, ¶ 22. The fact that one instruction, standing alone, is not as full or accurate as it might have been is not reversible error if the instructions as a whole fairly tender the case to the jury. State v. Archambault, 2007 MT 26, ¶ 25, 336 Mont. 6, 152 P.3d 698 (citing State v. Stone, 266 Mont. 345, 350, 880 P.2d 1296, 1299 (1994)). If an instruction is erroneous in some aspect, the mistake must prejudicially affect the defendant's rights to constitute reversible error. Bieber, ¶ 22.

SUMMARY OF THE ARGUMENT

The district court did not abuse its discretion in giving the jury a definition of "actual physical control" that differed only slightly from the definition formulated by this Court in State v. Ruona, 133 Mont. 243, 248, 321 P.2d 615, 618 (1958), using the phrase "bodily function that exercises restraint or directs influence" of a vehicle instead of "bodily restraint [or] directing influence." (Appellant's App. D, Instr. No. 9.) The district court was not bound by the definition given at Christiansen's first proceeding, which ended in a mistrial due to

a hung jury, nor was it bound by the model criminal jury instructions. The instruction given fully and fairly instructed the jury as to the applicable law.

Furthermore, the instruction given, even if erroneous, did not prejudicially affect Christiansen's rights. His attorney was still permitted to argue that the fact that Christiansen was asleep or passed out was dispositive of his case (even though Montana law provides otherwise). The instruction given was not reversible error.

ARGUMENT

I. THE DISTRICT COURT WAS NOT REQUIRED TO GIVE THE SAME INSTRUCTION ON "ACTUAL PHYSICAL CONTROL" THAT IT GAVE AT THE FIRST PROCEEDING, WHICH ENDED IN A HUNG JURY.

Christiansen relies on State v. Crawford, 2002 MT 117, 310 Mont. 18, 48 P.3d 706, for his contention that the district court was bound to give exactly the same instructions in this trial as it did in the first proceeding, which ended in mistrial. But Crawford does not address such a situation and is clearly distinguishable. In Crawford, the State had failed to object to an instruction that instructed the jury that, in order to convict, it needed to find "[t]hat the defendant possessed property, approximately $1025.00" and "[t]hat the property is proceeds from the exchange of dangerous drugs." Crawford, ¶ 17. This Court held that the amount of drug proceeds held--$1,025--became the "law of the case" even though it was not an element of the crime, and reversed the defendant's conviction

because the amount had not been proven beyond a reasonable doubt. Crawford, ¶¶ 27-29.

Crawford is completely distinguishable. First of all, Crawford involved the addition of an "unnecessary element" through jury instructions. Crawford, ¶¶ 20-21. No such "unnecessary element" was added in Christiansen's case. This makes the rule in Crawford inapplicable to Christiansen's case. See State v. Schmidt, 2009 MT 450, ¶¶ 70-71, 354 Mont. 280, 224 P.3d 618 (declining to apply Crawford to jury instructions that did not add or delete any elements of the offense).

Secondly, Crawford involved an instruction to which the State did not object. Crawford, ¶ 26. In Christiansen's case, the State did object to the jury instruction on "actual physical control" given in the first proceeding, seeking repeatedly to supplement or replace it with language that was similar to that used in the second trial. (See 12/18/08 Tr. at 217-18; 222-23, 233-38; D.C. Doc. 74 (Refused State's Proposed Instructions No. 11-12); D.C. Doc. 76, Given Instruction No. 6.) The fact that the State did object makes the "law of the case" doctrine of Crawford inapplicable. As this Court noted in State v. Azure, 2008 MT 211, 344 Mont. 188, 186 P.3d 1269, "in the myriad cases which recognize the rule that a jury instruction may become the law of the case, the articulation of this rule

invariably includes the qualification that the instruction was not objected to." Azure, ¶ 27 (citations omitted).

Finally, and most importantly, the "law of the case" doctrine of Crawford involved a single trial which proceeded to a normal conclusion. The "law of the case" doctrine simply has no application to Christiansen's situation, where a mistrial was declared, and a new trial held. The general rule of law has long been that "where the first proceeding results in a mistrial, the parties are placed in the same position as if there had been no trial in the first instance. Section 46-16-701, MCA; Waite v. Waite (1964), 143 Mont. 248, 389 P.2d 181; 58 Am.Jur.2d New Trial, § 588 (1989)."[1] State v. Van Dyken, 242 Mont. 415, 427, 791 P.2d 1350, 1358 (1990).

As the United States Supreme Court has said: "[L]aw of the case doctrine was understandably crafted with the course of ordinary litigation in mind. Such litigation proceeds through preliminary stages, generally matures at trial, and produces a judgment, to which, after appeal, the binding finality of res judicata and collateral estoppel will attach." Arizona v. California, 460 U.S. 605, 619 (1983).

[1] An updated reference is 58 Am.Jur.2d New Trial § 463 (2010): "Where a new trial is granted in a criminal case, it generally must proceed in all respects as if no trial had been had, and rulings in the former trial are not binding on the court in the later trial." (Footnotes omitted; emphasis added.)

The "law of the case" doctrine does not apply to litigation, such as Christiansen's, that does not follow the ordinary course.

In the trial from which Christiansen appeals, the district court was free to exercise its discretion in crafting the jury instructions, without being bound by the instructions given in the first proceeding, which ended in a hung jury. The real issue in this appeal, therefore, is whether the district court abused its discretion in giving the instructions it did.

II. THE DISTRICT COURT ACTED WITHIN ITS DISCRETION WHEN IT INSTRUCTED THE JURY ON "ACTUAL PHYSICAL CONTROL."

A. Background

Christiansen challenges the following instruction on appeal:

> The Defendant is in actual physical control of a motor vehicle if the Defendant is not a passenger, and has an existing or present bodily function that exercises restraint or directs influence, domination or regulation of a vehicle.

(Appellant's App. D, Instr. No. 9.)

This instruction was not proposed by either party. Christiansen proposed the following instruction:

> The Defendant is in actual physical control of a motor vehicle if the Defendant is not a passenger and is in a position to, and has the ability to, operate the vehicle in question.

(D.C. Doc. 79, Instr. No. 6; D.C. Doc. 109.) The State proposed the following instruction:

> "Actual physical control" means that a person has existing or present bodily restraint, directing influence, domination or regulation of a vehicle.

(D.C. Doc. 110, State's Proposed Instr. No. 5.)[2]

There was considerable discussion of these proposed instructions at the settlement of instructions. (6/4/09 Tr. at 213-16; 219-21; 226-28; 229-32.) The judge explained the rationale for choosing the language he did as follows:

> Okay. I realize the defense proposed number is a pattern instruction. However, I find it to be confusing and I believe that to fully and fairly instruct this jury on the law, I'm going to need a different instruction, as it relates to the meaning of the term actual physical control.
>
> All the cases cited by the State in its Proposed Instruction Number 5, I must disagree with the statement of defense counsel as to the--that its decisions and its reliance on the Taylor case, I believe that the Hudson decision more accurately relies on that 1958 decision of Ruona, . . . which is also cited in State's Proposed Instruction Number 5.
>
> I know that Taylor is referenced in the Hudson case. And in the Hudson case you will find in Paragraph 13 of the Hudson decision, that the Robinson case [sic] is cited for the very proposition that is contained in State's proposed, the Instruction Number 5.

[2] A second relevant instruction initially proposed by the State was later withdrawn. (6/4/09 Tr. at 221, 224; D.C. Doc. 110, State's Proposed Instr. No. 6 ("A motorist remains in a position to regulate a vehicle while asleep behind the steering wheel of a vehicle.").)

> In term that [sic] the Robinson decision relies on the Ruona . . . decision, a 1958 decision. After considering all of these cases, I believe the better instruction would be the Defendant is actually in actual physical control of a vehicle, if the Defendant is not a passenger and has an existing or present bodily function that exercises restraint or directs influence, domination or regulation of a motor vehicle. That's the instruction that I will give in lieu of either the Defendant's Proposed 6, or State's Proposed 5. I reject each of those.

(6/4/09 Tr. at 227-28.) Later, he added:

> I just want to make one additional statement as to my rational [sic] in advising the instruction in actual physical control: The evidence is that consumption of alcohol to a certain level can impair ones ability to control, or operate a vehicle. And indeed, if that is the case an instruction that defines actual physical control, to include an element of ones ability to operate a vehicle, would not only be confusing but would be contrary to the definition of under the influence used for the purpose of these types of charges.

(6/4/09 Tr. at 229.) And finally, after hearing additional argument from defense counsel, the judge stated:

> I do understand the Hudson decision to indicate the District Court did indeed give an instruction based upon the model criminal jury instruction, so I do understand that to be the case.
>
> That being said, I still find that model criminal jury instruction to be confusing, as it relates to the facts of this case. And for that reason, in order to wholly and fairly instruct on the law, I have presented my proposed instruction which will be the instruction to be given to the jury.

(6/4/09 Tr. at 231-32.)

In addition to giving the instruction on "actual physical control" cited above, the district court instructed the jury as follows:

I will instruct you on the laws you must apply to the evidence presented in the case in order to reach a verdict. I will do this not only orally, but also by giving you a set of written instructions which you will take with you during your deliberations. These instructions are intended to cover all necessary laws which are pertinent to the case.

You must take the law in this case from my instructions alone. You must not accept anyone else's version as to what the law is. You may not decide this case contrary to these instructions, even though you might believe the law ought to be otherwise. However, counsel may comment and argue to you about the law.

If, in these instructions, any rule, direction, or idea is stated in varying ways, no emphasis is intended by me, and none must be inferred by you. You are not to single out any sentence or any individual point or instruction and ignore the others. You are to consider all of the instructions as a whole and are to regard each in the light of all the others. The order in which the instructions are given has no significance as to their relative importance.

(Appellant's App. D, Instr. No. 1 at 1-2 (emphasis added).)

During closing argument, Christiansen's attorney argued:

[T]here are three elements, and the element that we're fighting hotly about is whether Kevin was in actual physical control of a motor vehicle. Okay. If I haven't made it clear enough already, that's the issue. Was he in actual physical control. We are not disputing the fact that he was upon the ways of the state open to the public. . . .

Kevin also isn't hotly contesting the issue is he was under the influence of alcohol, because clearly he was. . . . [W]e are conceding that he was under the influence. Our point is, he was so under the influence that he did not have an existing or present bodily function that exercises restraint or directs influence, domination or regulation of a vehicle.

(6/4/09 Tr. at 254 (emphasis added).)

Defense counsel continued, arguing: "Well, if the vehicle is in park and you're sleeping behind a wheel, do you have existing or present bodily function that exercises restraint? How do you direct influence, domination, or regulation of a vehicle, if the vehicle is in park? You don't." (6/4/09 Tr. at 255.) He continued to argue that the "actual physical control" element of the charge had not been proven, using the language, "existing or present bodily function that exercises restraint or directs influence, domination or regulation of a vehicle." (6/4/09 Tr. at 254-59; 261-62.)

B. Analysis

This Court's task on review of jury instructions is not to determine whether the district court formulated the instructions in the best possible way, but whether, read as a whole, they fully and fairly instructed the jury regarding the applicable law. State v. Archambault, 2007 MT 26, ¶ 27, 336 Mont. 6, 152 P.3d 698. In this case, the instruction to which Christiansen objects did fully and fairly instruct the jury as to the requirements for a finding of "actual physical control."

As early as 1958, this Court defined "actual physical control" as "existing or present bodily restraint, directing influence, domination or regulation of an automobile." State v. Ruona, 133 Mont. 243, 248, 321 P.2d 615, 618 (1958). The district court in this case added just three words to that definition, replacing "bodily restraint" with "bodily function that exercises restraint." This was not such

a significant change as to constitute an inaccurate or unfair statement of the applicable law.

Furthermore, the district court explained its reasons for making the small change in the Ruona definition--that is, that case law in Montana makes clear that a person need not be consciously exercising bodily restraint or directing influence over a vehicle in order to be in "actual physical control," but simply have the physical ability--the "bodily function"--to exercise such influence over the vehicle. The district court specifically cited four cases in support of its decision: Ruona, supra; State v. Taylor, 203 Mont. 284, 661 P.2d 33 (1983); State v. Robison, 281 Mont. 64, 931 P.2d 706 (1997); and State v. Hudson, 2005 MT 142, 327 Mont. 286, ___ P.3d ___. See 6/4/09 Tr. at 227-28.

In each of the cases cited, "actual physical control" was determined to include situations where the defendant was passed out or asleep. Ruona itself affirmed the DUI conviction of a defendant who was found "slumped over the wheel of a car" at 3 a.m., who was shaken three or four times by the investigating officer but who "just mumbled" in response. Ruona, 133 Mont. at 245, 321 P.2d at 616.

In State v. Taylor, 203 Mont. 284, 287, 661 P.2d 33 (1983), the Court specifically addressed the question of whether a motorist can be in actual physical control of a vehicle if he or she is asleep. The Court said:

> [N]umerous courts have held a motorist to be in actual physical control of a vehicle while asleep or passed out behind the steering wheel. . . . In so holding, the courts have viewed the motorist as being in a position to regulate the vehicle's movements . . . , or as having the authority to manage the vehicle . . . .
>
> We agree and apply the analysis to the facts now before us. Just as a motorist remains in a position to regulate a vehicle while asleep behind its steering wheel, so does he remain in a position to regulate a vehicle while asleep behind the steering wheel of a vehicle stuck in a borrow pit. He has not relinquished control over the vehicle. It does not matter that the vehicle is incapable of moving. Movement of a vehicle is not required for "actual physical control." State v. Ruona, [133 Mont. at 248, 321 P.2d at 618].

Taylor, 203 Mont. at 287, 661 P.2d at 34 (emphasis added; citations omitted).

State v. Robison, 281 Mont. 64, 931 P.2d 706 (1997), and State v. Hudson, 2005 MT 142, 327 Mont. 286, 114 P.3d 210, addressed the instructions given in those cases regarding "actual physical control." In Robison, the conviction was reversed because the district court had added the following language to the Ruona definition:

> Movement of the vehicle is unnecessary. One may be in actual physical control of a motor vehicle if he is physically inside an operational motor vehicle with the potential to operate or drive that motor vehicle while under the influence of alcohol on the ways of the State open to the public.

Robison, 281 Mont. at 66, 931 P.2d at 707. This language went far beyond what the district court did in the instant case, changing "bodily restraint" to "bodily function that exercises restraint." The language in Robison, focusing on being "physically inside" the vehicle and having the "potential" to operate or drive that

vehicle, would have extended the definition of "actual physical control" to mere passengers, which is precisely the status that Robison had claimed at his trial.

Nothing comparable occurred in the case at hand. Christiansen did not claim that he was a passenger, and nothing in the district court's modification of the Ruona definition would have improperly included passengers within its scope. Indeed, the district court's instruction in Christiansen's case specifically excluded passengers from it, stating "The Defendant is in actual physical control of a motor vehicle if the Defendant is not a passenger, and . . . ." (Appellant's App. D, Instr. No. 9.)

The Court in Robison did express some dissatisfaction with the Ruona definition (which it had adopted nearly forty years earlier), urging the Criminal Jury Instruction Commission to "consider adopting a clearer and more understandable definition of this phrase as part of the model Montana Criminal Jury Instructions." Robison, 281 Mont. at 68, 931 P.2d at 708. Nevertheless, the Court made it clear that its decision was not based on any flaw in the Ruona definition, or on its applicability to individuals who were sleeping or passed out, stating:

> Factually, this case is not unlike many of the scenarios described in the cases relied upon by the State. Indeed, had the court properly instructed the jury, Robison could properly have been found guilty of DUI--he was alone, asleep or passed out, in the front seat of an automobile, with the motor running and lights on in a parking lot; he was clearly intoxicated. With a proper instruction on "actual

> physical control", the jury could have convicted Robison of DUI on this record, believing that he had been driving or that he had dominion, directing influence, or regulation of the vehicle. Rather, it is the additional language which the court added to the instruction on "actual physical control" . . . that concerns us here.

Robison, 281 Mont. at 67, 931 P.2d at 708 (emphasis added). The Robison Court clearly felt that the Ruona definition, though "perhaps not the most clear and understandable definition," was adequate to fully and fairly instruct the jury regarding the applicable law. Id. Similarly, the definition given by the district court in Christiansen's case, though "perhaps not the most clear and understandable definition," was adequate.

Finally, in State v. Hudson, 2005 MT 142, 327 Mont. 286, the Court considered whether the new definition adopted by the Criminal Jury Instruction Commission at the Court's suggestion in Robison fully and fairly instructed the jury on the applicable law. While indicating that the definition in Ruona was still valid, the Court also approved the new definition in the Montana Criminal Jury Instructions--"is in a position to, and had the ability to, operate the vehicle." Hudson, ¶ 13 (citing the Ruona/Robison definition); ¶ 15 (approving the new Model Criminal Jury Instruction). Clearly, the Court was not wedded to any single verbal formulation, so long as the definition "accurately reflects the law as developed by judicial interpretation." Hudson, ¶ 15. The district court's

instruction in Christiansen's case accurately reflected the law, and his conviction must be affirmed

The fact that the instruction in Christiansen's case was not the Model Criminal Jury Instruction that was approved in Hudson does not make it invalid. In a case very similar to this one, the Court in Archambault found no reversible error where the district court declined to give a Model Criminal Jury Instruction, giving instead an instruction based on Montana law that had been approved by the Court prior to the adoption of the model instructions. Archambault, ¶¶ 20-28. The Court said:

> Our task on review is not to determine whether the District Court chose the better of two legally proper instructions. Nor is our task to determine whether the court formulated the instructions in the best possible way. Rather, . . . we must simply consider whether the given instructions fully and fairly instructed the jury regarding the applicable law.

Archambault, ¶ 27 (citation omitted). In Christiansen's case, the given instruction fully and fairly instructed the jury, using substantially the same language that was approved in Ruona and used for decades in Montana. The district court did not abuse its discretion.

Furthermore, the instruction given did not prejudicially affect Christiansen's rights, as defense counsel had the opportunity to argue his defense theory that Christiansen was "so under the influence that he did not have an existing or present bodily function that exercises restraint or directs influence, domination or

regulation of a vehicle." 6/5/09 Tr. at 254; see State v. Larson, 2004 MT 345, ¶ 48, 324 Mont. 310, 103 P.3d 524; State v. Hudson, 2005 MT 142, ¶¶ 17, 22, 327 Mont. 286, 114 P.3d 210.

Christiansen is essentially asking this Court to grant him a new trial so that he can again try to convince a jury to adopt an interpretation of "actual physical control" that this Court has clearly rejected. The fact that he was passed out or asleep in his vehicle is not, as he argued to the jury, dispositive of his case. Like the defendant in Robison, he "could properly have been found guilty of DUI--he was alone, asleep or passed out, in the front seat of an automobile, with the motor running and lights on in a parking lot; he was clearly intoxicated." Robison, 281 Mont. at 67, 931 P.2d at 708; see also State v. Peterson, 236 Mont. 247, 251, 769 P.2d 1221, 1224 (1989) (rejecting defendant's policy argument that individuals should not be penalized for "sleeping it off" in their vehicles, noting that "[t]he better policy is that a person should ascertain his ability to drive before climbing behind the wheel . . . .").

Unlike the defendants in Taylor, Robison or Hudson, Christiansen did not have an additional defense that was affected by the definition of "actual physical control." He did not claim that the vehicle could not be driven because it was stuck, as in Taylor, nor did he claim that somebody else had started the car and abandoned him in it, as in Robison or Hudson. Indeed, every element required for

conviction was conceded by Christiansen. He has suffered no prejudice, and his case should be affirmed.

CONCLUSION

The State respectfully requests that Christiansen's conviction be affirmed.

Respectfully submitted this 22nd day of June, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief of Appellee to be mailed to:

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CERTIFICATE OF COMPLIANCE

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SHERI K. SPRIGG